IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

COLLIN MURRAY, *Appellant,*

vs.

SIOUX-ALASKA MINING CO., a corporation; H. M. SMITH; HASTINGS CREEK DREDGING CO., a corporation, and JOSEPH BELLEVIEW, *Appellees.*

No. 2655

Brief for Appellant

WILLIAM A. GILMORE,
300 Central Building,
Seattle, Washington,

JAMES E. FENTON,
New Call Building,
San Francisco, California,
Attorneys for Appellant.

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STATEMENT OF THE CASE.

This is a creditor's bill brought by the appellant, Collin Murray, against the appellees. The appellant in this suit seeks to satisfy his claim for wages and money advanced out of the equitable estate of appellee, Sioux-Alaska Mining Company's interest in the purchase price of a certain dredge, the title to which heretofore stood in the name of appellee H. M. Smith as trustee for said Sioux-Alaska Mining Co.

Appellant alleges in his complaint (Tr. 3) that he performed the services and advanced the money therein described for the appellee, Sioux-Alaska Mining Co., in the years 1910, 1911 and 1912; that about the same time in 1912, the said appellee transferred the title of its dredge to appellee H. M. Smith, to secure the payment of a loan of Five Thousand Five Hundred Dollars ($5,500.00) under an oral understanding with a right to sell or dispose of it, all of the proceeds in excess of Five Thousand Five Hundred Dollars ($5,500.00) to belong to and to be paid by said Smith to the Sioux-Alaska Mining Co.; that appellee, Sioux-Alaska Mining Co., is wholly and totally insolvent and that it has no property real or personal and that it is impossible by any legal process to reach the trust fund sought to be enjoined and attempted to be reached by this creditor's bill; that on the 2d day of March, 1915, the appellee H. M. Smith was acting as trustee of the appellee, Sioux-Alaska Mining Co., and on said date entered into a written agreement with appellee, Belleview, to sell the said dredge for the sum of Seven Thousand Dollars ($7,000.00) and that said Smith was about to deliver the possession and title of said dredge to the said Belleview and other appellees and about to collect the said money; that the said appellee, Sioux-Alaska Mining Co. pur-

posely, deliberately, fraudulently and designably chose and selected appellee, H. M. Smith, a non-resident of Alaska, as its trustee so as to prevent the appellant from compelling the said Smith to account for the proceeds in the District of Alaska where said dredge is located; that by reason of the fact that the said Sioux-Alaska Mining Co. had placed its personal property in the name of said H. M. Smith, it was impossible for the appellant to reach the said property by any legal process permitted or allowed by law; that it is now impossible by legal process to attach, garnish or reach the said proceeds of said sale in any other manner except by injunction of the Court in this action.

None of these facts are disputed by any of the appellees. The appellee, Sioux-Alaska Mining Co., is resisting the relief demanded by the appellant and does not deny that it is the owner of the trust fund sought to be enjoined and does not deny its insolvency or that it owes the appellant the money demanded. In other words, every fact alleged and plead by the appellant stands admitted in the record.

The appellee, Belleview, in his testimony (Tr. 24-29), admits that the sum of Six Thousand Dollars ($6,000.00) is to be paid to appellee, H. M. Smith, or in default of said payment, that he is to re-convey the

dredge to said Smith. It is admitted and undisputed in the record (Tr. 12-14) that said H. M. Smith has received Seven Thousand Dollars ($7,000.00) to cover the Five Thousand Five Hundred Dollars ($5,500.00) with interest as follows: Five Thousand Dollars ($5,-000.00) from Knowles and Hansen (See letter of H. S. Sandvig, Secretary of Sioux-Alaska Mining Co., Tr. pp. 14, 15); also One Thousand Dollars ($1,-000.00) subsequently from Knowles & Hansen (Tr. 12); and also an additional One Thousand Dollars ($1,000.00) from Belleview (Tr. 29). The letter of Secretary Sandvig (Exhibit A. Tr. 14), conclusively shows that the balance of Six Thousand Dollars sought to be reached in this action to secure the claim of the appellant is the property of appellee debtor, the Sioux-Alaska Mining Co., which said debtor was within the jurisdiction of the Court and subject to its equitable authority.

SPECIFICATIONS OF ERRORS.

1. The Court erred in making and entering its certain order granting the defendants' motion to vacate the temporary restraining order heretofore issued in said cause.

2. The Court erred in making and entering its order refusing and denying the plaintiff an injunction *pendente lite* in said cause.

3. The Court erred in making and entering its order sustaining the demurrer of the defendant Sioux-Alaska Mining Co., a corporation, to the plaintiff's complaint upon the 3d day of July, 1915.

4. The Court erred in making and entering its order sustaining the demurrer of the defendant Joseph Belleview to plaintiff's complaint on the 3d day of July, 1915.

5. The Court erred in making and entering said final decree in favor of the defendants and against the plaintiff on said 10th day of July, 1915.

ARGUMENT.

The transcript in this case discloses three separate appeals, the first from an order vacating the temporary restraining order issued by the lower court, the second from an order denying appellant's motion for an injunction *pendente lite,* and the third from the final decree entered by the Court. The specifications of errors on all three appeals bring before this Court but one legal question for decision, to-wit: Does the appellant's

complaint state a cause of action and can the appellant maintain this equitable suit or creditor's bill and reach the fund in controversy without first reducing his claim to judgment in a court of law? All the errors assigned by appellant raise the question whether or not appellant can maintain a creditor's suit without first resorting to a legal action to prove the insolvency of the debtor, except the one based upon the Court's order sustaining appellees' demurrer. These questions can all be discussed in answering the question propounded above.

This proceeding is in the nature of a proceeding in rem.

> Vol. 12, Cyc. p. 5, *Houghton vs. Alexsson,* 67 Pac. 825.

A creditor may prosecute a suit for himself alone.

> 12 Cyc. p. 36 and numerous cases cited.
>
> See also 14 Century Digest "Creditor's Suit," Sec. 100 et seq.

"A bill is not demurable because brought by one creditor by himself although it mentions other creditors but contains no invitation for them to come in." *Morrison vs. Blue Star N. Co.,* 67 Pac. 344.

Where it is shown that judgment and execution would be fruitless and involve useless and unnecessary expense, a creditor might maintain a creditor's bill to

reach equitable interests of his debtor without first obtaining a judgment at law.

12 Cyc. p. 11 and numerous cases cited in foot note 25.

So it has been held that where the fund sought to be reached is beyond legal processes, the debtor is insolvent and the claim of the plaintiff is undisputed, a creditor's bill might be maintained, although no judgment was first had suing the debtor.

12 Cyc. p. 11 and cases cited in foot note 26.

Compiled Laws of Alaska, Section 833, p. 375 provides as follows:

"The distinction between actions at law and suits in equity, and the forms of all such actions and suits, are abolished, and there shall be but one form of action for the enforcement or protection of rights and the redress or prevention of private wrongs, which is denominated a civil action."

See also citations following said section in Compiled Laws of Alaska.

The cases read and relied upon by counsel for the defendants, were decisions that originated in States that are not governed by any such an act as the one above quoted, and in such states the distinction between actions at law and equitable actions has not been abolished.

In those States where a similar statutory provision is found to our own, the decisions are quite uniform.

See *Hurlbutt vs. Saw Co.,* 28 Pac. 795 (93 Cal. 55).

The demurrers should have been overruled and the appellees compelled to answer and go to trial.

"Although an action may be commenced as an equitable one, yet, where there is nothing to give a Court equity jurisdiction thereof, the Court has authority to permit it to be tried as an action at law, if the defendant is not thereby prevented from having a fair trial." *Surber vs. Kittenger,* 6 Wash. 240 (33 Pac. 507).

This very provision has been construed by this Court in the case of *Madden vs. McKenzie,* 114 Fed. 65, wherein the Circuit Court in a unanimous decision after quoting Section 833 of the Compiled Laws above set forth, says:

"Such a statute, while it does not abolish all distinction between law and equity as to procedure, has the effect to render inapplicable to any complaint the objection that the plaintiff has a plain, speedy and adequate remedy at law."

Appellant was entitled to the equitable relief demanded.

See *Tal'y vs. Curtain,* 54 Fed. p. 44

This was a suit wherein a creditor's bill was filed to set aside an assignment of the debtor's property for the benefit of the creditors.

The Court in this case did not insist upon the recovery of a judgment as prerequisite to setting aside a fraudulent deed of assignment, because the recovery of a judgment and a fruitless execution, would have been vain, as the deed in question not only professes to, but did in express words convey and assign all the debtor's property and rights of property to a trustee, and stripped him irrevocably of all his assets.

This case completely distinguishes the case of *Scott vs. Neely,* 140 U. S. 106, relied upon by counsel for appellees, wherein they contend that they are entitled to trial by jury, under the Seventh Amendment of the Constitution of the United States.

The appellee Sioux-Alaska Mining Company by assigning its property and placing it in the name of H. M. Smith, equitably waived its right to a trial by jury, by compelling the appellant in this case to resort to an equitable remedy.

We further cite the Court to the case of *Cons. T. L. Co. vs. Kansas City,* 45 Fed. 16.

In this latter case, the Court on page 16 says:

"It is finally insisted by counsel representing some of the respondents that the action must fail for the reason that complainants are not judgment debtors, and there has been no return of nulla bona on execution. Our view of this matter is expressed by Mr. Justice Strong in *Case vs. Beauregard,* 101 U. S. 688-691. Looking to the foundation upon which the rule contended for rests, is ought not to apply where judgment and execution would be fruitless."

The Court then quotes the opinion of the Court in the Beauregard case, *Supra,* as follows:

"When the debtor's estate is a mere equitable one, which cannot be reached by any proceeding at law, there is no reason for requiring attempts to reach it by legal process. * * * It may be said that, whenever a creditor has a trust in his favor, or a lien upon property for the debt due him, he may go into equity without exhausting legal processes or remedies. Indeed, in those cases in which it has been held that obtaining a judgment and issuing an execution is necessary before a Court of equity can be asked to set aside fraudulent dispositions of the debtor's property the reason given is that a general creditor has no lien. And when such bills have been sustained without a judgment at law, it has been to enable the creditor to obtain a lien, either by judgment or execution. But when the bill asserts a lien or a trust, and shows that it can be made available only by the aid of a chancellor, it obviously makes a case for his interference."

See also Vol. 5 Ency. of Pleadings and Practice, p. 520.

"But there are other authorities of equal respectability, if not as numerous, denying the necessity for a judgment when the debtor is insolvent, on the ground

that the creditor should not be required to prosecute an action at law, knowing beforehand that he will not be able to collect his judgment by the ordinary processes, and it is believed that the Supreme Court of the United States has leaned towards this view."

See numerous cases cited in Foot Note 1, p. 520.

In conclusion we submit that the appellant in this case is entitled to have said decree reversed and the demurrer overruled and that he is entitled to equitable relief of the Court, and that he is entitled to an injunction *pendente lite,* enjoining the appellees Belleview and the Hastings Creek Dredging Company from paying, or causing to be paid to the appellee H. M. Smith or the Sioux-Alaska Mining Co. or any one in their behalf, said fund, and enjoining said Belleview and said Hastings Creek Dredging Co., if they fail to carry out their agreement with said H. M. Smith, from reconveying the said dredge to said Smith or the Sioux-Alaska Mining Co. until the further and final order of the Court.

In closing we call the Court's attention to the fact that the only party objecting now to this relief is the appellee debtor, the Sioux-Alaska Mining Co., which said company certainly ought not to have an equitable standing in court, as it certainly does not come into court with clean hands. It ought to be very evident to

the Court that the Sioux-Alaska Mining Co., the debtor of the appellant, is only in court trying to secure equitable rights for appellee H. M. Smith for the use and benefit of itself. We submit the decree of the lower Court should be reversed and said cause remanded for trial.

Respectfully submitted,

William A. Gilmore
and James E. Fenton,
Attorneys for Appellant.